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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/028,768	12/28/2001	Gee Sung Chae	2658-0281P	4297
2292	7590	01/30/2006	EXAMINER	
BIRCH STEWART KOLASCH & BIRCH PO BOX 747 FALLS CHURCH, VA 22040-0747			RICHARDS, N DREW	
			ART UNIT	PAPER NUMBER
			2815	
DATE MAILED: 01/30/2006				

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/028,768

Applicant(s)

CHAE, GEE SUNG

Examiner

N. Drew Richards

Art Unit

2815

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 17 January 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).


4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: 2, 6 and 24.
Claim(s) rejected: 1, 3-5, 7, 8, 21-23, 25 and 26.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____.
13. ☐ Other: _____.


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Continuation of 11. does NOT place the application in condition for allowance because: though applicant's arguments have been considered, they are not persuasive. Applicant has argued that the prior art does not teach the second metal layer being adapted to be a dry etching mask to pattern the first metal layer. In discussing this limitation and the language used therein, applicant refers to the *In re Venezia* decision. Applicant discusses how the *In re Venezia* decision teaches that language such as "adapted to" is not only definite under 35 USC 112, second paragraph, but also can be used to properly define structural features. In the Examiner's previous response, the Examiner noted that the arguments dealing with the definiteness of the "adapted to" language were moot. Applicant's present response takes issue with the Examiner's statement by stating that the examiner denied applicant fundamental substantive and procedural due process. This is not the case as the Examiner did consider all arguments previously filed and found them to be not persuasive. The Examiner used the term "moot" to signify that the portions dealing with the definiteness issues were not pertinent to patentability of the present claims as the present claims have been considered definite. The Examiner did not intend the use of the term "moot" to imply that the arguments were being dismissed out of hand without proper consideration.

Further, in consideration of the "adapted to" language used in the present claims, the Examiner appreciates applicant's point that language such as "adapted to" can be properly used to define structural features of their invention. The examiner does not disagree with this point. However, in regards to the "adapted to" language of the instant claims, the examiner's position is that this language does not define structure that differentiates the claimed structure over the structure of the prior art. Applicant has claimed that the second metal layer is adapted to be a dry etching mask to pattern the first metal layer. This limitation is considered taught by Song et al. The second metal layer 75/76 of Song et al. is formed in the same pattern as the first metal layer 55/56, defines the same separation between the source and drain electrode as the first metal layer, and has side-walls that are aligned with the first metal layer. Since the second metal layer of Song et al. includes the structure necessitated to allow it to be a dry-etching mask, it is considered "adapted to be a dry etching mask" as claimed. It is noted that Applicant has not particularly pointed out what structural features the second metal layer of Song et al. is alleged to lack such that it is not "adapted to" be a dry etching mask.

Applicant further argues that the masks of Song et al. are layers 300, 400 and 500, none of which is the second metal layer. This argument is not persuasive since the claim language does not preclude the use of other masking structures during the fabrication process.

Applicant further argues that the outstanding Office Action provides no factual evidence that because the second metal layer is above the first metal layer, the second metal layer is adapted to be a dry etching mask. Applicant states that the only objective evidence in Song et al. itself, and Song et al. do not teach the second metal layer being adapted to be a dry etching mask. First, it is noted that since the Office Action established a *prima facie* case of anticipation that Song et al. discloses all the claimed limitations, the burden has been shifted to the applicant to provide evidence or a showing that the second metal layer of Song et al. is not "adapted to" be a dry etching mask. Regardless, further objective evidence that is already of record can be found in figure 7, for example, of Applicant's specification. Figure 7 shows that the second metal layer 36a1 or 36a2 that is "adapted to be a dry etching mask." As seen in figure 7, the second metal layer is formed directly on the first metal layer, defines a separation between the source and drain electrodes in the same pattern as the first metal layer, and has side-walls that are aligned to side-walls of the first metal layer. Thus, these structural features are considered the structural limitations of the "adapted to" claim language. Song et al. anticipates the claims since Song et al. disclose the second metal layer is formed directly on the first metal layer, defines a separation between the source and drain electrodes in the same pattern as the first metal layer, and has side-walls that are aligned to side-walls of the first metal layer, as seen in figure 4 for example.

Applicant further argues, and basis previous arguments upon this point, that Song et al. does not disclose its second metal layer is adapted to be used as a dry etching mask to pattern the first metal layer. This is not persuasive. Even though Song et al. does not include explicit language that their second metal layer is adapted to be used as a dry etching mask, the structure disclosed in the figures does include this limitation. The fact that Song et al. does not mention their second metal layer being so adapted does not change the fact that their second metal layer as shown in figure 4 is adapted to be used as a dry etching mask, whether they actually use it as so or not. Applicant further argues that Song teaches away from using the second metal layer as a dry etching mask by using a separate mask. This is not persuasive since the claim language does not require the second metal layer to actually be used as a dry etching mask, merely that its structure is adapted so that it can be used in such manner. The second metal layer of Song et al. is formed with a structure that is adapted so that it can be used as a dry etching mask as claimed and therefore reads on the claimed invention.

For these reasons, the Examiner has met their initial burden of presenting a *prima facie* case of unpatentability and applicant's arguments are not persuasive.